

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin and Remy

From: Emelyn Rodriguez, Legal Counsel
John Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Adoption of Proposed Amendments to Regulations 18700, 18707 and 18708 – “Public Generally” and “Legally Required Participation” as Affirmative Defenses to an Enforcement Action.

Date: November 14, 2005

I. EXECUTIVE SUMMARY

This project proposes amendments to regulations 18700, 18707 and 18708 under the Political Reform Act (the “Act”),¹ relating to the “public generally” exception and the exception for “legally required participation” as affirmative defenses. Staff proposes amendments to these regulations in order to add clarifying language reflecting the Commission’s interpretation of sections 87101 and 87103.²

The proposed regulatory amendments would expressly provide that in an enforcement proceeding for a conflict-of-interest violation, it is the respondent’s burden to establish that the public generally or legally required exception applies as affirmative defenses.

At its October 12, 2005 meeting, the Commission held pre-notice discussion of this project. There was no public comment. The Commission did not express any concerns regarding the regulatory language presented and favored passage of the proposed amendments to final adoption. Consistent with the Commission’s determination, staff noticed the proposed regulation through the Office of Administrative Law. Staff recommends adoption of the proposed amendments.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

² Under the eight-step analysis for determining whether a public official has a disqualifying conflict of interest in a governmental decision, the last two steps – determining whether the “public generally” exception applies to the decision, or whether the official is legally required to participate in the decision – have historically been viewed by the Commission as exceptions to the general rule, and therefore as affirmative defenses, to a conflict-of-interest violation. However, current regulations do not explicitly state which party – the respondent or the prosecution/enforcement – has the burden of proof.

II. ISSUES AND BACKGROUND

Staff's pre-notice memorandum had a thorough discussion of the issues and background. (Pre-notice of Amendments to Regulations 18700, 18707, 18708 – Public Generally and Legally Required Participation as Affirmative Defenses, Legal Division memorandum to Chairman Randolph and Commissioners, September 26, 2005.) These are briefly summarized below for easy reference.

In clarifying the conflict-of-interest rules under sections 87100 and 87103, the Commission adopted regulations setting forth a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).)

The “public generally” rule – in Step 7 – allows a public official who otherwise has a conflict of interest to take a role in the governmental decision in question, if the reasonably foreseeable material financial effect of a governmental decision on the public official's economic interest is *indistinguishable from its effect on the public generally*. (Section 87103; regulations 18700(b)(7), 18707(a).)

The “legally required participation” rule – in Step 8 – allows a public official who is otherwise disqualified due to a conflict of interest, to take a role in the governmental decision in question, *only if* their participation in the decision is *required by law*. (Section 87101 regulation 18708.)

The Commission has historically viewed the “legally required participation” rule as an exception, and this perspective has remained uncontroversial and is supported by case law. The Commission has also viewed the “public generally” rule as an exception. The Commission's most recent interpretation of the “public generally” rule was set forth in a Legal Division 2000 memorandum by Senior Commission Counsel Lawrence T. Woodlock (attached). As discussed below, the Commission concurred with the conclusions of the memorandum, which stated that “public generally” is also an exception, and thus an affirmative defense to be raised and proved by the respondent.

This regulatory project is intended to add clarifying language to codify the Commission's interpretation of the two exceptions provided under sections 87101 and 87103.

III. COMMISSION INTERPRETATION

A. Public Generally:

Exception versus Element of an Offense:

Since 1976, the Commission has treated “public generally” as an exception to the general rule, rather than as an element of a conflict-of-interest violation. This view is reflected in the Commission's original regulation interpreting the language in section 87103, which construed the clause “distinguishable from its effect on the public generally,” as stating an *exception* to a presumption about financial effects on public

officials.³ The Court of Appeal, First Appellate District, Division One, upheld the 1976 version of the regulation in the case of *Consumers Union of United States, Inc. v. California Milk Producers Advisory Board* (1978) 82 Cal. App. 3d 433. Although there have been amendments to this regulation since then, these amendments have been consistent with the 1976 regulation. The current version of regulation 18707 reflects the same presumption.

The primary distinction between the two approaches involves which party bears the burden of proof. If public generally is treated as an exception, the burden of proof is on the official who has a disqualifying conflict of interest to demonstrate that the “public generally” exception applies – or that the material financial effect of a governmental decision on his or her economic interest is *indistinguishable* from the effect on the “public generally.” If it is not treated as an exception, but as an element of the offense, the FPPC Enforcement staff would have the burden of proving that the “public generally” exception does not apply.

Interpretation of the “Public Generally” Language in Section 87103

In 2000, during the Phase II Conflict of Interest Regulations Improvement Project, questions were raised about the Commission’s long-standing approach. Interested parties argued that section 87103 could be interpreted to state that “public generally” is an essential element of a violation, not an exception.

Due to these concerns, the Commission in July 2000 held a discussion considering this exception in detail. The Commission asked staff to research whether the Commission’s interpretation of “public generally” as an exception is supported by the statutory language.

The Legal Division memorandum stated that the Commission’s approach in treating public generally as an affirmative defense to be raised and proven by the respondent, and not as an element of the violation to be proven by the prosecution, was the proper statutory interpretation.

The memorandum makes three main arguments supporting the Commission’s existing interpretation of section 87103: (1) the Commission’s existing interpretation of section 87103 is supported by case law interpreting similar statutes that states where a statute first defines an offense in unconditional terms, and then specifies an exception to its operation, the exception is an affirmative defense to be raised and proven by the defendant; (2) the existing interpretation is consistent with the rule of necessity or convenience, which provides that the burden of proving an exonerating fact may be imposed on a defendant if its existence is peculiarly within the defendant’s personal knowledge and/or proof of its non-existence would be relatively difficult or inconvenient

³ “A material financial effect of a governmental decision on an official’s interests as described in Government Code Section 87103(a) through (d), is distinguishable from its effect on the public generally *unless* the decision will affect the official’s interest in substantially the same manner as it will affect all members of the public or a significant segment of the public.” (Regulation 18703, adopted February 3, 1976; Emphasis added.)

for the prosecution; and (3) the Commission's interpretation is entitled to some measure of presumed correctness as a consistent interpretation not seriously challenged during 25 years of use. In addition, the memorandum concluded that an alternative construction that would shift the burden of proof to the prosecution may be possible, but it is not supported by any of the above considerations.

In its September 8, 2000 meeting, the Commission agreed with the conclusions of the staff memorandum; none of the Commissioners objected to treating "public generally" as an exception. However, the Commission declined to amend language in regulation 18707, to explicitly state that the "public generally" exception was an affirmative defense.

At the October 2005 prenotice discussion of this project, Commissioner Huguenin inquired why the Commission had not amended regulatory language to reflect its view that the "public generally" exception is an affirmative defense. Staff stated that minutes of the Commission's September 8, 2000 meeting indicated that some Commissioners did not think that express language was necessary at the time, because the Commission's position was clear.

However, since this decision, the FPPC Enforcement Division has continued to face some uncertainty when preparing cases for prosecution due to the absence of express language assigning the burden of proof in these cases.⁴ As a result, the Division last year proposed regulatory changes to regulations 18700 and 18707 that would clearly reflect the Commission's interpretation of the "public generally" rule, and thus expressly provide that in an Enforcement proceeding for a conflict-of-interest violation, it is the public official's burden to establish that the "public generally" exception applies.

B. Legally Required Participation:

The conflict-of-interest provisions of the Act prohibit a public official from making, participating in or in any way attempting to use his or her position to influence a governmental decision in which he or she knows or has reason to know he or she has a financial interest. (Section 87100.)

However, where a governmental body is unable to act due to the disqualification of a number of its members, the Act includes a limited exception:

"Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his [or her] participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his

⁴ As noted in staff's pre-notice memorandum, there have been no administrative cases that explicitly assign this burden of proof. Thus, if an administrative law judge misinterprets the Commission's view regarding the "public generally" exception, it could result in an adverse decision. As this is an issue that comes up in every conflict-of-interest case that the Enforcement Division examines, the division believes it is an issue that needs to be resolved.

participation legally required for purposes of this section.” (Section 87101.)

The “legally required participation” rule – in Step 8 – allows a public official who is otherwise disqualified due to a conflict of interest, to take a role in the governmental decision in question, *only if* their participation in the decision is *required by law*. An official who acts pursuant to this exception must follow certain procedures and make certain disclosures.

The treatment of the “legally required participation” rule as an exception to the Act’s conflict-of-interest rules is well settled. The Commission has described it as “a limited exception to the prohibition contained in Section 87100.” (*In re Hudson* (1978) 4 FPPC Ops. 13.) In *Affordable Housing Alliance v. Feinstein* (1986) 179 Cal.App.3d 484, the court, citing *Hudson*, stated that, “Section 87101 establishes a limited exception to the rule that a public official shall not participate in a governmental decision in which he or she has a financial interest.”

In 2000, the Commission approved amendments to regulation 18708 “setting forth standards for this exception.”⁵ Input from the regulated community and staff at the time indicated that there were no problems with the application of the regulation.⁶

Thus, the arguments outlined above concerning the Commission’s treatment of an exception as an affirmative defense also apply here.⁷

IV. REGULATORY AMENDMENTS

The proposed regulatory amendments would provide language clarifying the Commission’s interpretation of sections 87101 and 87103. The amendments would specify that a respondent in an enforcement proceeding for a conflict-of-interest violation has the burden of proving that the “public generally” or “legally required participation” exceptions apply.

The proposed amendments to regulation 18700(a) would make it clear that:

“A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his/her economic interests, unless the public official can establish either: (1) that the effect is indistinguishable from

⁵ These changes were enacted in 2000 as part of its Phase II Conflict of Interest Regulations Improvement Project.

⁶ Staff memorandum by Commission Counsel William L. Williams, dated October 1, 2001, discussing Conflict of Interest Regulations Improvement Project – Status Report and Pre-notice Discussion, pg. 9.

⁷ The same principles of statutory construction described in *Spry* are applicable – i.e., where a statute defines an offense then specifies an exception to its operation, the exception is an affirmative defense to be raised and proved by the defendant.

the effect on the public generally, or (2) ~~A conflict of interest is disqualifying if the public official's participation is not legally required.~~

The amendments would also specify for purposes of the “public generally” exception that:

“If the official can establish that the reasonably foreseeable material financial effect on the public official's his or her economic interest is indistinguishable from the effect on the public generally, he or she does not have a conflict of interest within the meaning of the Political Reform Act.” (Reg. 18700(b)(7).)

With regard to the “legally required participation” exception, the amendments state that:

“If the official can establish that his or her participation is legally required, he or she may participate in the governmental decision despite the conflict of interest.” (Reg. 18700(b)(8).)

The proposed amendments to regulation 18707(a) would specify that:

“Notwithstanding a determination that the reasonably foreseeable financial effect of a governmental decision on a public official's economic interests is material, a public official does not have a disqualifying conflict of interest in the governmental decision if the official can establish that the governmental decision will affects the public official's economic interests in a manner which is indistinguishable from the manner in which the decision will affect the public generally as set forth in Title 2, California Code of Regulations, sections 18707.1 – 18707.9.”

Lastly, the proposed amendments to regulation 18708(a) specify that:

“A public official who has a financial interest in a decision may establish that he or she is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code section 87101 unless only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.”

V. STAFF RECOMMENDATION

Staff recommends that the Commission approve for adoption the proposed amendments to regulations 18700, 18707, and 18708.

Attachments:

Attachment 1: Proposed amendments to regulations 18700, 18707 and 18708

Attachment 2: Staff memorandum dated August 25, 2000 by Senior Commission Counsel Lawrence T. Woodlock